United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2073

To be argued by
LILLIAN Z. COHEN

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. EDITH MAY CAMERON, STANLEY TAYLOR SIMS, KENNETH DAVIS, ROBERT STUART WILLIAMS, MARVIN CAMERON, AND JENNIE SIMS,

Petitioners-Appellants,

-against-

CHARLES FASTOFF, Director, NYC Department of Probation; WALTER DUNBAR, NY State Director of Probation; JOHN KLEIN, Chief Probation Officer, Queens County; THOMAS AGRESTA, Presiding Justice, Supreme Court, Criminal Term, Queens County, LEON J. VINCENT, Warden, Green Haven Correctional Facility, Stormville, NY: J. EDWIN LAVALLEE, Warden, Clinton Correctional Facility, Dannemora, NY: JAMES THOMAS, Warden NYC Correctional Institution for Men, Rikers Island, NY; and HAROLD J. SMITH, Warden, Attica Correctional Facility, Attica, NY,

Respondents-Appellees.

BRIEF FOR RESPONDENTS-APPELLEES

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Docket No. 75-2073

BRIEF FOR RESPONDENTS-APPELLEES

Questions Presented

1. Have appellants satisfied the exhaustion requirement of 28 U.S.C. § 2254(b) with respect to their claim that their constitutional rights were violated during the state court hearing held on their motion to suppress when their briefs in the state courts are devoid of any reference to the constitutional grounds now relied upon and the opinion of the Appellate Division does not purport to decide these claims?

2. Were appellants' constitutional rights violated at the hearing held on their motion to suppress when (a) the officer who made out the affidavit in support of the warrant testified fully and freely with respect to the basis for the application and interposed his Fifth Amendment privilege only when questioned about the disposition of the seized items, (b) defense counsel did not ask the officer if he had perjured himself in the affidavit, although this was the subject of the hearing, (c) defense counsel did not call as a witness the other officer who participated in the investigation and surveillance, although he was apparently available and (d) appellants initially waived their right to a hearing on the motion to suppress, although they were in a position to deny the truthfulness of the contents of the affidavit?

3. Was the affidavit sufficient on its face to justify the issuance of a warrant where, in addition to a detailed recitation of the affiant's surveillance it (a) stated that the affiant was an expert in policy operations and (b) set forth the basis for the affiant's knowledge that the person whose activities were observed had been arrested many times for policy violations?

Statement

This is an appeal from two orders of the United States District Court for the Eastern District of New York (Bruchhausen, J.), dated March 20, 1975 and March 31, 1975, which denied appellants' joint application for writs of habeas corpus. The District Court denied a certificate of probable cause on April 15, 1975. A certificate was granted by this Court on May 9, 1975.

Facts

On May 15, 1972, appellants Robert Williams and Marvin Cameron were convicted of criminal possession of a dangerous drug in the second degree and each was sentenced to an indeterminate term of imprisonment not to exceed fifteen years; Stanley Taylor Sims and Kenneth Davis were convicted of criminal possession of a dangerous drug in the third degree and sentenced to indeterminate terms of imprisonment not to exceed fifteen years and twelve years, respectively; and Jennie Sims and Edith Cameron were convicted of criminal possession of a dangerous drug in the sixth degree and each was sentenced to a fine of $1,000 and a period of probation not to exceed three years.

Appellants all pleaded guilty before Mr. Justice William C. Brennan in Supreme Court, Queens County on February 17, 1972.*

Pursuant to these convictions appellants Williams, Marvin Cameron, Stanley Sims and Davis are confined at the New York City Correctional Institution for Men at Rikers Island,

*The guilty pleas were in satisfaction of indictments charging Edith May Cameron, Marvin Cameron, Stanley Sims, Robert Williams and Kenneth Davis with the crime of criminal possession of dangerous drugs in the first degree, promoting gambling in the first degree, and possession of gambling records in the first degree. Edith and Marvin Cameron were also indicted for possession of a dangerous weapon as a misdemeanor. Jennie Sims was indicted for the crimes of promoting gambling in the first degree, possession of gambling records in the first degree and possession of a dangerous weapon as a misdemeanor.

Attica Correctional Facility, Attica, New York, Ossining Correctional Facility, Ossining, New York and Clinton Correctional Facility, Dannemora, New York, respectively. Appellants Jennie Sims and Edith Cameron are in the custody of Supreme Court, Queens County and the State Department of Probation.

The Motions To Suppress

Prior to entering their guilty pleas appellants made two motions to suppress the evidence seized pursuant to search warrants at the time they were arrested. The first motion alleged solely that there was no probable cause for the issuance of the warrants. At that time appellants expressly waived a hearing to test the facts stated in the affidavit on the basis of which the warrants had been issued. A copy of the affidavit is set forth in the Appendix to appellants' brief at pp. 6-7. It was sworn to on May 21, 1971 before Judge Nicholas Tsoucalas.

According to the affidavit, on Tuesday, May 18, 1971, at about 11:10 a.m., Patrolman Lucido Bonino, a plainsclothesman assigned to gambling investigations, saw one Stanley Sims, a man listed in Police Department records as "Known Gambler No. 4993," leave his residence in St. Albans, Queens, and enter an automobile. Seated behind the wheel of the automobile was a male negro whom Bonino did not know.

Patrolman Bonino knew Sims to be a man "involved in illegal policy operations." His affidavit in support of the search warrant discloses that, in the records of the New York City Police Department, Sims is listed as having been arrested 15 times for "Policy Violations, most of which are for Controller of Policy Operations."

Sims and the unknown man drove to 145-40 New York Boulevard, Jamaica, New York, and entered the premises. Patrolman Bonino remained outside and kept the premises under observation for 5 hours. He saw "approximately" six unknown male Negroes enter and remain inside. At 4:30 p.m., Sims, who was carrying a large paper bag, and the driven of the automobile left 145-40 New York Boulevard and drove back to Sims' residence in St. Albans. Both Sims and his companion entered Sims' home, with Sims still carrying the paper bag.

Bonino kept Sims' home under surveillance for 35 minutes and saw "numerous unknown males" knock on the front door and carry on short conversations with Sims. Each man handed Sims brown envelopes and departed. The brown evelopes, according to Patrolman Bonino, were of a kind which are used by "policy collectors."

The next day, at approximately the same time in the morning, Patrolman Bonino again went to the Sims' residence. He observed Sims and the driver of the vehicle again leave and drive to the same place in Jamaica, and later return to Sims' home. While Bonino watched for six and one-half hours, he saw the same type of transactions repeated that he had observed the previous day.

On the following day, Thursday, March 20, 1971, Boninc kept Sims, his residence and the Jamaica premises under observation for over five hours, and again observed the same type of transactions take place.

Bonino concluded that Sims and the driver of the automobile were receiving and accepting policy wagers at the Sims' home and the Jamaica address. On May 21, 1971, he applied for and received search warrants authorizing him to search Sims' home, the Jamaica address, and a 1970 Plymouth automobile, for gambling paraphernalia.

Pursuant to a search warrant issued by Judge Tsoucalas, a large quantity of policy slips was seized at 145-40 New York Boulevard. In addition, the police found 20 lbs. of pure heroin and two loaded revolvers.

The search of Sims' residence resulted in seizure of additional gambling records, two more revolvers, over $40,000 in cash and diamonds and other jewelry valued at about $15,000. A subsequent search of Sims' bank safe deposit box resulted in the seizure of approximately $70,000 additional cash and some U.S. Savings Bonds.

On November 30, 1971, appellants' motion to suppress was denied (O'Connor, J.) on the ground that, as a matter of law, there was probable cause to issue the warrants.*

Thereafter, on January 12, 1972 a motion was made for an order directing that a hearing be held to controvert the search warrants. In support of the motion, appellants' attorney alleged that:

> "[s]ince the submission of issues in this matter to the court, it has come to my attention that as a result of testimony given before the Knapp Commission by Patrolman Phillips, a Federal Grand Jury has been convened to examine questions specifically related to the conduct of the arresting officers in this case."

It was further alleged on information and belief that the officers "had refused to testify before the Grand Jury on the basis of the possibility of self-incrimination". It was also alleged on information and belief that "the affidavit upon which the warrant was issued contained perjured testimony." Although

* A copy of Justice O'Connor's opinion was submitted to the Court below and also annexed to appellees' affidavit in opposition to the issuance of a certificate of probable cause by this Court. For the convenience of the Court a copy is annexed hereto as Addendum "A".

the affirmation acknowledges that a hearing had previously been waived, appellants' attorney asserted that for the purposes of the original argument "it was assumed, but not conceded" that the facts in the affidavit underlying the warrant were true.

The Queens County District Attorney's office alleged in opposition to the motion that the application contained no information relative to the federal grand jury, and failed to state whether appellants' attorney learned about the grand jury proceedings before the date of Justice O'Connor's decision. In addition, the District Attorney alleged that he had been advised by the United States Attorney's Office for the Southern District of New York that, although two officers connected with this case had been called before a federal grand jury, "the testimony sought from them had nothing whatsoever to do with their conduct in the case before this Court."*

On January 26, 1972, appellants' motion for a hearing was denied by Justice Brennan, who stated:

> "the [appellants] and their attorney know best whether or not there was any perjury in the affidavit in support of the application for the warrant. Nevertheless, the affidavit in support of this application is not only barren of facts with respect thereto but also entirely lacking reference to any one or more respects in which it is claimed that the [officer's] affidavit is perjured".

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* Copies of appellants' motion papers and the District Attorney's affidavit were submitted to the District Court and annexed to appellees' affidavit in opposition to the issuance of a certificate of probable cause by this Court. For the convenience of the Court a copy of each is annexed hereto as Addendum "B" and "C", respectively.

In denying the motion the Court expressly refrained from drawing any inference from appellants' waiver of a hearing and relied instead on the failure to state facts in support of the new application. A copy of Justice Brennan's opinion is set forth in the Appendix to appellants' brief at pp. 9-11.

On appeal the Appellate Division, Second Department affirmed Justice O'Connor's finding that there was probable cause to issue a warrant based upon the statements in the police officer's affidavit. People v. Cameron, 40 A D 2d 1035 (2d Dept., 1972). However, Justice Brennan's order denying a hearing was reversed, although the Court acknowledged that the grounds in support of appellants' application were "tenuous". The appeal was held in abeyance pending a hearing in the trial court to determine the validity of appellants' claim that the officer's affidavit was perjurious. The Court, in accordance with the Court of Appeals decision in People v. Alfinito, 16 N Y 2d 181 (1965), placed the burden of proof on appellants and directed that "any fair doubt arising from the testimony at the hearing is to be resolved in favor of the warrant."

The Hearing On Remand

The hearing was held in June, 1973, two years after the issuance and execution of the warrant in issue. The appellants first called Officer Lucido Bonino who had prepared the challenged affidavit.

Patrolman Lucido Bonino testified that he had been a member of the New York City Police Department for ten years, and that for three of those years he had worked in the area of gambling investigation(4).* Officer Bonino stated that at 11.10 A.M. on May 18, 1971 he and Officer Barry Fratello were parked outside petitioner Stanley Sims' home in a private automobile (10).* He observed Sims, whom he recognized from pictures and a prior observation, leave the house and enter a 1970 Plymouth (6, 12, 13). The officers followed Sims to 145-40 New York Boulevard in Jamaica, the residence of Edith and Marvin Cameron (13).

At this point there was some discussions between counsel and the Court as to the basis for the hearing. Appellants' counsel explained that he was relying not only on the Knapp Commission reference in challenging the affidavit. "The other basis is that the statements made by the officer in his observations were not consistent with the truth....and indeed

* Unless otherwise indicated, numbers in parentheses refer to minutes of the hearing.
** He could not say precisely where they were parked (12) but explained later that during the three days of observation involved they chose different parking spots (32).

never occurred...." (15-16). Officer Bonino was then asked if he had been subpoenaed to testify "before any grand jury in connection with your investigation of Stanley Sims" (18). Bonino initally gave a negative answer which he then withdrew stating "I was under the impression you referred to the federal grand jury. Yes, we did testify before a Queens Grand jury" (19). When asked if he had appeared before a federal grand jury "in connection with your investigation of Stanley Sims, what preceded the arrest, the arrest and what followed the arrest" Officer Bonino asserted his privilege against self-incrimination (20). The hearing then recessed to permit Officer Bonino to confer with his attorney.

When the hearing was reconvened the answer last given by Officer Bonino was stricken and he testified that he was subpoenaed before a federal grand jury, but "not directly" in reference to the Sims' case (31). Bonino said that he arrested Sims and the other petitioners on May 21, 1971. At the time of the arrest he and his fellow officers seized drugs, money and jewelry from the Cameron and Sims homes. When asked if any

drugs, money or jewelry had been seized which was not reported to the Police Property Clerk Officer Bonino refused to answer (35, 36, 37, 38, 40). He was then asked:

> Q. Now, when you appeared before the federal grand jury, were you asked questions relating to what I just asked you?
>
> A. I don't believe I was. And if I was, I did invoke my constitutional privileges.
>
> Q. Were you questioned in the federal grand jury concerning the truthfulness of the affidavit that you submitted in order to procure a search warrant in this case.
>
> A. As far as my recollection goes, I was not questioned on that. And if I was, I would have again invoked my constitutional privileges" (40).*

He was not directly asked if his affidavit was truthful although the trial judge had indicated to defense counsel that this line of inquiry was relevant and ought to be pursued (39).

After this exchange Bonino was questioned at some length about the circumstances under which the affidavit was prepared including his observations and the notes he took at the time. He answered all of these questions without interposing his Fifth Amendment privilege.

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*Bonino's statements that he did not recall being asked about the Sims' case before the federal grand jury are consistent with the District Attorney's affidavit stating that according to the United States Attorney's office Bonino was not asked about the Sims' case. See Addendum "C" annexed hereto.

He stated that on May 18, 1971 he made certain observations of the Sims' home and, although he took notes "on a piece of paper" he could not remember if he had made notes in his memo book (46). The page for that date was not available. The memo book page for May 19, 1971 showed only that he was in the vicinity of the Sims and the Cameron homes "regarding search warrant observation" (49). The affidavit was typed up by another officer at his direction and on the basis of the notes he had made on a separate sheet of paper (42).

Bonino stated that in observing the Sims address he and his fellow officer changed vantage points each day (52). On May 18, 1971, Sims entered a 1970 Plymouth driven by an unknown male. The two men drove to the Cameron residence and went inside (58). During the two hours they remained there Officer Bonino and his fellow officer watched the house from the parking lot of a supermarket directly across the street. At first, the two officers used an automobile as an observation point. Then the fellow officer went to get an observation truck which he also parked in the lot (57). Officer Bonino stated that while he observed the Cameron residence he saw several unidentified males come to the house. He did not see any policy slips or hear anyone discussing any bets (60).

Sims then left the Cameron residence with his driver and returned home at about 2:55 P.M. Between 2:55 P.M. and 3:30 P.M. Bonino saw Sims receive envelopes from a number of unknown males (61). The envelopes were of a kind he had seen "many times in policy operations" (63). Each time a person came to the door it was Sims who answered. Bonino "could look right at him" (65, 67). When asked "as an expert in policy" on what the policy is based, Bonino testified that the policy is based on the numbers in the third, fifth and seventh races, and that the envelopes could have been bets for the next day or for previous work (62-63).

Officer Bonino testified that he procured a search warrant for the Sims and Cameron residences and also for the 1970 Plymouth. When asked by defense counsel if his motion for preparing the affidavit was to gain access to the homes and seize money Bonino replied, "the purpose of my affidavit here was a policy operation" (43). Counsel then asked,

> "Q. What did you expect to get in the Sims' house after you prepared the search warrant?
>
> A. Policy records.
>
> Q. Did you intend at the time to seize any cash money?
>
> A. All I knew of my affidavit was for policy and other gambling paraphernalia" (44).

In response to questions by the Court Bonino stated that he prepared the affidavit when he made the application for the warrant, that he signed it after reading it over and that he swore to the truth of the statements contained in the affidavit when he appeared before Judge Tsoucalas of the Criminal Court (69-70).

Officer Bonino was then excused and the Court asked counsel if he had another officer he wished to call (70). Counsel replied, "I do, but I'm not going to call him" (71).

Appellants' next witness was Henry Schnitzer who testified that he had been a member of the Bar of the State of New York for over thirty years, and member of the New York City Police Department for six years preceding his law career. During his tenure in the Police Department, he had been sworn as an expert to testify in cases involving policy operations. Mr. Schnitzer stated that no one places policy bets after the third race on a given day and that no special envelopes were used in a policy operation (76).

Edith Cameron, one of the appellants, residing at 145-40 New York Boulevard, Springfield Garden, New York, testified that between 11:30 a.m. and 2:30 p.m. on the 18th day of May, 1971, only Stanley Sims came to her residence (78-79). She stated that the remaining appellants joined Sims that evening at her home. On the 19th day of May only Kenneth Davis and Robert Williams came to her house (80). On cross-examination, Edith Cameron testified that she had pleaded guilty to the crime of criminal possession of gambling records in the second degree in the case which was the subject of the hearing.

Jennie Sims, one of the appellants, residing at 197-01 116th Avenue, St. Albans, New York, testified that no one came to her house between the hours of 2;55 p.m. and 3:30 p.m. on the 18th, or 19th day of May, 1971 (82). On cross-examination, Mrs. Sims testified that she had pleaded guilty to criminal possession of gambling records in the second degree.

After the hearing appellants submitted a memorandum in support of their motion, a copy of which was filed with the District Court by appellees. They argued that they had sustained their burden of proof and that once Bonino asserted his privilege "it was incumbent upon the people to refute the admission of perjury inherent therein" (page 7). They acknowledged that after Bonino asserted his privilege he did testify as to his observations but claimed that his testimony was not persuasive because he could not remember details, he had to refresh his

recollection and the page for May 18, 1971 was missing from his memo book. Appellants claimed they were deprived of the opportunity to show perjury in the affidavit.

On August 4, 1973, Justice Brennan denied Appellants' motion.* He initially rejected the contention that once Officer Bonino asserted his privilege the People were required to rebut the admission of perjury "inherent therein".

> "This conclusion implies an inherent admission of perjury with respect to any sworn statements at any time previously made by any person who exercises such constitutional privilege. This Court doubts that the men who wrote that privilege into the constitution intended that any person who availed himself of it thereby automatically conceded an admission of perjury. On the contrary, it would appear that by permitting a person to exercise such privilege, they were recognizing his right to protect himself without committing perjury".

The Court proceeded to examine the instances at the hearing where Bonino asserted his privilege to "determine whether the answers thereof, if given, might significantly aid the Court in determination of the truth or falsity of the affidavit made in

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* A copy of Justice Brennan's opinion is set forth in the Appendix to Appellants' Brief at pp. 16-29.

support of the warrants." Upon such examination the Court found that

> "it is obvious that the witness invoked his constitutional rights only when asked about police conduct in connection with the execution of the warrants and not with respect to affidavit preceding it". (emphasis supplied).

Although the witness stated that he would have asserted his privilege if the federal grand jury had asked about the truthfulness of the affidavit, the Court found that at the hearing the witness, in fact, did not invoke his privilege on this issue.

> "The witness was closely questioned at considerable length concerning the preparation of the affidavit, the reasons for it, the observations of witness, the facts and circumstances preceding the execution of it, to all of which the [officer] testified freely without once asserting his constitutional rights". (emphasis supplied).

Insofar as appellants claimed that the State should have called Bonino's fellow officers the Court noted this was unnecessary since the burden of proof was on the appellants. In addition, there was no uncontradicted evidence produced by the appellants which the People were required to refute. Accordingly, the fact that the People did not call these witnesses "cannot be viewed in the light that their version would controvert any proof previously offered.....".

The Court rejected as "untenable" appellants' suggestion that Bonino "was evasive and in fact refusing to testify".

> "An examination of the testimony shows direct answers to all questions relating to observations and activities of the officers and defendants leading up to and including the preparation of the affidavit in the instant case."

Furthermore, the Court refused to agree with appellants' suggestion that

> "unlawful conduct other then perjury of an individual, whether or not he be a police officer, if proven to have been committed subsequent to the execution of an affidavit, establishes perjury in the affidavit".

In reviewing the testimony of appellants' other witnesses the Court concluded that Mr. Schnitzer was unpersuasive, as was the theory that "no policy banker would take a bet after 2 P.M., as bearing upon Officer Bonino's testimony that he had observed envelopes being handed to defendant Sims after 2 P.M., on May 19, 1971". Mrs. Cameron's testimony "unsupported by more credible evidence, cannot be accepted at face value in light of her obvious interest in the outcome and her plea of guilty in this very case...." The Court was "unimpressed" by Mrs. Sims' testimony.

In ruling against the appellants the Court pointed out that

> "[e]ven assuming arguendo, that proof had been adduced of criminal acts of the police officer during or subsequent to the making of the affidavit, the conclusion that the affidavit was perjurious would be without foundation".

The fact that a police officer is involved makes no difference particularly where, as here, he availed himself of the privilege in a limited area and "testified freely with respect to his conduct prior to and in connection with the execution of the affidavit....".

Accordingly, the Court held that "no doubt has been cast upon the truth of the contents of the affidavit" and appellants have failed to sustain their burden of proof. (Emphasis supplied).

Appellants appealed to the Appellate Division from Justice Brennan's order and in their brief argued affirmatively that they had met their burden of proof at the hearing."* They claimed that once the officer asserted his privilege "this action alone" (p.13) was sufficient to satisfy their burden. In their view, because Bonino was a policeman, as opposed to a private

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* A copy of appellants' brief was filed by appellees in the District Court.

citizen, his taking the Fifth raised "an implication of perjury". They also cited the missing memo page and the District Attorney's failure to call Bonino's fellow officer as "negative evidence" of perjury. Finally, they preserved for further appellate review their claim that the affidavit was legally insufficient.

The Appellate Division unanimously affirmed Justice Brennan's order. People v. Cameron, 44 A D 2d 355 (2d Dept. 1974). The Court noted that

> "all of the police officer's refusals to answer dealt with the occurrences which took place after the seizure under the warrant; none of them dealt with the truthfulness of the affidavit upon which the warrant was obtained. The record is crystal clear that he was examined in great detail about the contents of his affidavit and answered every question asked him with respect to that."
> 44 A D 2d 355.

Moreover, although Bonino stated that he would have invoked his privilege if questioned by the Federal Grand Jury, defense counsel did not directly ask him whether his affidavit was truthful, despite Justice Brennan's suggestion that this be

done.

> "If that had been done and if the officer had then invoked his constitutional privilege against incrimination, we would be presented with a different picture. Here, however, we have a situation in which the ultimate burden of proof to establish perjury was upon the moving defendants (People v. Alfinito, 16 N Y 2d 181,186) and I cannot quarrel with the court's findings that they failed to sustain that burden, particularly as another police officer was present at the time the observations underlying the affidavit were made and was not called as a witness, despite the court's pointed suggestion that this be done." 44 A D 2d 355.

An application for leave to appeal to the Court of Appeals was denied on May 29, 1974 (Wachtler, J.).

Appellants thereafter filed a petition for a writ of certiorari to the United States Supreme Court. In it for the first time they challenged the validity of the hearing in Constitutional terms. They argued that Bonino's invocation of his Fifth Amendment privileges deprived them of due process of law, the effective assistance of counsel, freedom from improper search and seizure, compulsory process and confrontation of witnesses. Appellants also argued that there was no probable cause to issue the search warrants. The petition was denied on December 9, 1974.

The Petition For Habeas Corpus

In support of their application to the District Court appellants submitted virtually the same memorandum of law as that submitted to the Supreme Court on the petition for certiorari. On March 20, 1975, the District Court denied the application, holding that appellants' plea of guilty waived all prior non-juris dictional defects. Appellants then moved for reargument citing Lefkowitz v. Newsome, _____U.S._____ 43 L. Ed 2d 196(1975) as authority for their contention that the Court should reach the merits of their claims. On March 31, 1975, the District Court again denied relief, holding this time, that the opinion of the Appellate Division, affirming appellants' judgments of conviction, "completely refutes their claim of lack of due process and fair hearing." Appendix to appellants' brief, p. 60. The District Court denied a certificate of probable cause on April 15, 1975.

POINT I

APPELLANTS HAVE FAILED TO SATISFY THE EXHAUSTION REQUIREMENT OF 28 U.S.C. § 2254(b) WITH RESPECT TO THEIR CLAIM THAT THEIR CONSTITUTIONAL RIGHTS WERE VIOLATED DURING THE STATE COURT HEARING HELD ON THEIR MOTION TO SUPPRESS.

It is fundamental that, as applicants for federal habeas corpus relief, appellants have the burden of demonstrating that they have exhausted their available state remedies. In order to satisfy this burden they must show either (1) that they "fairly presented to the state courts" the same constitutional claims relied upon in their federal application (See Picard v. Connor, 404 U.S. 270, 275[1971]; United States ex rel. Gibbs v. Zelker, 496 F. 2d 991 [2d Cir. 1974]) or (2) that there was no available remedy to review this claim. 28 U.S.C. § 2254(b). They have shown neither.

It is clear from the briefs submitted by appellants to the state courts relative to their hearing that aside from the references to the Fifth Amendment as invoked by Officer Bonino, appellants made no other reference to the Constitution, let alone to any constitutional basis for obtaining relief. The entire thrust of their state court briefs

was that they had satisfied their burden of proof at the hearing as a matter of state law. It is equally clear from the opinions written by the state courts that they did not view appellants' claim in any other terms than those in which it was cast.

The first reference to any alleged constitutional violation was made in appellants' petition for certiorari. Appellants concede as much in their brief in this Court where they claim to have exhausted their remedies because they presented the state courts with the "substance" of the constitutional allegations upon which they rely. Appellants' brief, pp. 39, 40. The argument is defective in two respects.

First, it is precisely this type of approach which the Supreme Court rejected in Picard v. Connor in considering the exhaustion requirement. In Picard, the petitioner had claimed in the state courts that based upon certain facts he had been denied his constitutional rights under the Fifth Amendment. He then presented the same facts to the Federal courts which sua sponte considered them in light of the Equal Protection Clause of the Fourteenth Amendment and found a constitutional violation. The Supreme Court reversed holding:

> "...it is not sufficient merely that the federal habeas corpus applicant has been through the state courts. The [exhaustion] rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts." 404 U.S. at 275-276.

This rule has been strictly followed by this Court. United State ex rel. Gibbs v. Zelker, 496 F. 2d 991 (2d Cir. 1974); United States ex rel. Nelson v. Zelker, 465 F. 2d 1121 (2d Cir. 1972); United States ex rel. Rogers v. LaVallee, 463 F. 2d 185 (2d Cir. 1972). Appellants have shown no reason why this rule should not be followed in their case.

The second defect in appellants' argument is that it is questionable whether even the substance of their present claim was presented to the state courts. The thrust of their argument in the state courts was that they had sustained their burden of proof once Bonino asserted his Fifth

Amendment privileges because there was an admission of perjury inherent in this action. This was basically an affirmative argument made under state law as opposed to what are now essentially negative arguments, i.e., they were unconstitutionally deprived of the opportunity to cross-examine Bonino and the State effectively withheld evidence from appellants. Appellants' brief, p. 18.

Indeed, appellants are now arguing - as they did not in the state courts - that there was a "refusal" by the State to provide evidence supposedly within its control. Appellants' brief, pp. 16, 17. In any event assuming arguendo that appellants' state court briefs may be read as questioning the fairness of the hearing, this does not relieve them of the obligation of specifically presenting their precise constitutional claims to the state courts for review. United States ex rel. Nelson v. Zelker, 465 F. 2d 1121, 1124-1125 (2d Cir. 1972).

Appellants claim they no longer have a state court remedy. However, § 440.10(1)(h) of the New York Criminal Procedure Law "provides an adequate post-conviction procedure to adjudicate previously unconsidered unconstitutional claims".

United States ex rel. Gibbs v. Zelker, 496 F. 2d 991, 994, n. 6 (2d Cir. 1972).* At the least, it is always open to appellants to make an application to reargue their motion for leave to appeal to the New York Court of Appeals.

POINT II

THERE IS NO MERIT TO APPELLANTS' CLAIM THAT THEY WERE DEPRIVED OF CONSTITUTIONAL RIGHTS AT THE HEARING ON THEIR MOTION TO SUPPRESS.

Appellants claim that their constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments were violated at the hearing on their motion to suppress. In support of this contention they seek to hold "the State of New York" responsible for what occurred on the theory that the "claim of privilege by this policeman, the representative of the State action in this case, is a claim of Fifth Amendment privilege by the State" and, as such, a "cover-up" and a withholding by the State "of its agent's corruption." Appellants' brief, pp. 19, 18. As a result they claim that they were deprived of "the opportunity to adequately meet their burden of proving the perjury and misconduct of this officer". Appellants' brief, p. 23. There is no merit to this claim.

*Appellants cite § 440.10(2)(c) as foreclosing post-conviction collateral relief. If they do so because there was no justification for their failure to raise their constitutional claims on direct appeal this is tantamount to a concession that they by-passed their available state remedies.

The privilege against self-incrimination is a personal, substantive right that is unequivocal and without exception. Couch v. United States, 409 U.S. 322, 327-328 (1973). It is available to police officers and private citizens alike. Garrity v. New Jersey, 385 U.S. 493 (1967). In neither case does its invocation contain any inference of guilt. As the Supreme Court observed in Slochower v. Board of Education, 350 U.S. 551, 557-558 (1956):

> "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury .... The privilege serves to protect the innocent who otherwise might be ensared by ambiguous circumstances."

See also Malloy v. Hogan, 378 U.S. 1, 8 (1964); Griffin v. California, 380 U.S. 609 (1965).

Since the privilege exists to protect the individual, the State could not - as appellants ingenuously suggest - compel its officer to waive his privilege merely because of the employment relationship.* Garrity v. New Jersey, supra;

*Appellants alternatively suggest that the State could have given Bonino use immunity. However, New York statutes presently provide only transactional immunity. Criminal Procedure Law § 50.10. Contrast former N.Y. Code of Criminal Procedure § 619-c.

Gardner v. Broderick, 393 U.S. 273 (1968). See also Turley v. Lefkowitz, 414 U.S. 70 (1973). It follows that the State cannot be charged with the withholding of evidence involving the alleged corruption of its agent.*

A fortiori there is no analogy between this case and those where there has been an outright refusal by the State to provide information to the defense. The refusal cases cited by appellants are inapposite, in any event, since in each of them the refusal followed a request or demand made by the defense, e.g. by subpoena. Appellants' Memo. pp. 1-2. In the instant case, assuming arguendo that a demand could have been met by the State, none was made.

In short, the State did nothing to violate any of appellants' rights. It is asserted no privilege. It withheld no information. And in no event may it be held accountable for appellants' failure to satisfy their burden of proof at the hearing.

Nor were appellants' rights violated by the mere fact that Officer Bonino invoked the Fifth Amendment when asked what happened after the warrants were executed.

*By the same token the evidence may hardly be characterized as "totally within [the] custody and control" of the State. Appellants' brief, pp. 16, 22.

While the constitutional right of an accused to confront witnesses against him includes the right to effective cross-examination [Pointer v. Texas, 360 U.S. 440 (1965)], reversible error is not invariably committed whenever a witness claims his constitutional privilege not to answer questions which might tend to incriminate him. Namet v. United States, 373 U.S. 179, 185-186 (1963); United States v. Cardillo, 316 F. 2d 606 (2d Cir.), cert. denied 375 U.S. 822 (1963). Rather, it is necessary to look to the circumstances of each case to determine whether the claim of testimonial privilege substantially curtailed the right to effective cross-examination (Namet v. United States, supra). A determination of whether a claim of testimonial privilege substantially impairs the right to cross-examination depends upon an analysis of the purpose of the questions asked and the role which the answers, if given, might have played in the defense. Fountain v. United States, 384 F. 2d 624 (5th Cir.), cert. denied sub nom. Marshall v. United States, 390 U.S. 1005 (1968).

In the instant case, the trial court found, as a matter of fact, that officer Bonino invoked his right against self-incrimination only when asked about his conduct in connection with the execution of the warrants and not with

respect to the affidavit preceding it. This finding of fact which appellants do not dispute, was affirmed in the opinion of the intermediate appellate tribunal. Thus, the state courts found that the police officer witness did not claim his testimonial privilege with regard to the critical issue of perjurious statements in the affidavit, but only with regard to the collateral issue of the execution of the warrant, a factor which, as appellants themselves concede, merely bore upon the witness' credibility. In these circumstances the claim of privilege did not amount to an undue restriction of the right to confront witnesses. State v. McKuin, 434 F. 2d 391 (8th Cir. 1970), cert. denied 401 U.S. 911 (1971); United States v. Brickey, 426 F. 2d 680 (8th Cir.), cert. denied 400 U.S. 828 (1970); United States v. Norman, 402 F. 2d 73 (9th Cir. 1968), cert. denied 397 U.S. 938; Fountain v. United States, 384 F. 2d 124 (5th Cir.) cert. denied sub nom. Marshall v. United States, 390 U.S. 1005 (1968); United States v. Aiken, 373 F. 2d 194 (2d Cir.), cert. denied 389 U.S. 833 (1967); United States v. Collier, 362 F. 2d 135 (7th Cir.) cert. denied 385 U.S. 977 (1966); Coil v. United States, 343 F. 2d 573 (8th Cir.), cert. denied 382 U.S. 821 (1965); United States v. Cardillo, 316 F. 2d 606 (2d Cir.), cert. denied 375 U.S. 822 (1963).

Appellants seek to capitalize on Bonino's statement that he would have invoked the Fifth Amendment before the Federal Grand Jury if asked there about the truthfulness of his affidavit. Their reliance on this testimony is misplaced in view of the fact that after so testifying Bonino answered each and every question about his observations and the preparation of the affidavit and his motive for obtaining the warrants without once invoking his privilege.* Moreover, appellants did not directly ask Bonino whether the statements were true despite the trial court's suggestion that they do so and despite the fact that this was precisely the fact they wished to have determined when they asked that a hearing be held. Having chosen not to ask this question, their current speculation that Bonino would have asserted his privilege is singularly inappropriate.**

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* Actually the trial court was lenient in allowing counsel to ask questions about the observations themselves since appellants, at the time of their original motion, had expressly waived a hearing on this point. The testimony given by Mrs. Sims and Mrs. Cameron was not "newly discovered" at the time of the hearing and the fact that they chose not to rely upon it at the time of the original motion to suppress weighs very heavily against their credibility at the hearing. Similarly, appellants theory about the time policy bets are placed could have been developed in support of the original motion as a basis for challenging Bonino's statement that he saw bets placed after 2:00 p.m.

** Appellants state in their argument heading for Point I of their brief that the State, through its officer, "declin[ed] to respond to questions...about the truthfulness of a search warrant affidavit...". This misleading statement is obviously refuted by the record.

This is only one of several instances in the record where appellants attempt to have it both ways. Thus, as appellees have noted, appellants rely upon the alleged "refusal" of the State to provide evidence, yet never once demanded that the State do anything. On page 19 of their brief they attribute assertion of the Fifth Amendment privilege to the State and, on page 22, they suggest that Bonino may have waived his privilege. In urging a possible waiver they refer to Bonino's appearance before a State grand jury. Yet, although Bonino specifically mentioned this appearance in his testimony at the hearing he was not questioned with regard to what occurred before the State grand jury. Finally, although appellants now claim that they were deprived of their opportunity to challenge the truthfulness of the affidavit once Bonino invoked the Fifth Amendment, they specifically advised the Court that they would not call the fellow officer who was present during the observations and available to testify (70-71).*

* There is a suggestion in the record that appellants were trying to have it both ways at least as early as the pendency of their original motion to suppress. At the time of that motion appellants expressly waived a hearing to examine the truthfulness of the affidavit. It was only after the denial of the motion that they moved for a hearing based upon alleged information about the police officers obtained "[s]ince the submission of issues in this matter to the court". As the District Attorney pointed out in opposing the hearing, appellants failed to indicate whether they had obtained their information before the date of Justice O'Connor's order denying the motion to suppress as a matter of law. See Appellees' Addendum "B" and "C".

It is evident from this pattern that appellants are attempting to substitute hindsight and belated speculation about what might have transpired for the factual allegations necessary to support a claim in this Court. They may not fill the holes in their claim so easily. Nor may they blame either the prosecution or Officer Bonino for their own failure to utilize the information and witnesses known to them and available at the time of the hearing.

In short, the state courts afforded appellants a full and fair hearing before a sophisticated trier of facts on the question of the truthfulness of the Bonino affidavit. Comprehensive and detailed findings of fact were made by the trial court. Further inquiry into those same facts by the District Court is, therefore, totally unwarranted and appellants' claim must stand or fall on the legal issue alone. 28 U.S.C. § 2254(d). Accordingly, the decision of the District Court should be affirmed.

POINT III

THERE WAS SUFFICIENT INFORMATION IN OFFICER BONINO'S AFFIDAVIT TO JUSTIFY THE ISSUANCE OF SEARCH WARRANTS IN THIS CASE.

In evaluating the legal sufficienty of Officer Bonino's affidavit the question raised is whether it presented sufficient information to the Magistrate to persuade him as a reasonable and prudent man that there was probable cause to issue the requested warrants. Giordenello v. United States, 357 U.S. 480, 486-487 (1958). The state court had no difficulty in finding that probable cause did exist and justifiably so.

The challenged affidavit sets forth the following facts:

1. Officer Bonino was a "plainclothes officer assigned to gambling investigations".

2. Officer Bonino knew Stanley Sims to be a man "involved in illegal policy operations".

3. Stanley Sims is listed in Police Department records as "Known Gambler No. 4993". He has a record of 15 arrests for policy violations and most of those were for "Controller of Policy Operations".

4. On three successive days Sims was seen to leave his home, enter a 1970 Plymouth driven by an unknown male negro, and go to the Cameron residence where he remained for several hours during which time "approximately" six other man entered and also remained.

5. Each day he left the Cameron residence carrying a large paper bag and returned to his home.

6. Following his return, "numerous unknown males" were seen to knock on the front door and carry on short conversations with Sims. Each man departed after handing Sims brown envelopes of a kind used by "policy collectors". In each instances the door was answered by Sims.

7. The officer kept Sims under surveillance a total of nearly 17 hours during the three day period.

8. The officer, "an expert qualified by the Courts on Policy", concluded that Sims and the unknown male negro who drove him back and forth each day were receiving and accepting policy wagers inside the Sims and Cameron residences.

Clearly, Officer Bonino's detailed recitation of the results of his surveillance, taken together with his expertise in policy operations and his knowledge of Stanley Sims' police record, combined to create the requisite probable cause for issuance of the requested search warrants. See Aguilar v. Texas, 378 U.S. 108, 109 (1964).

Appellants contend that, as in Spinelli v. United States, 393 U.S. 410 (1969), the characterization of Sims as a known gambler "is a 'bald and unilluminating assertion of suspicion [that] is entitled to no weight'". 293 U.S. at 414. However, Spinelli is easily distinguished on this point. There the affidavit relied upon the affiant's knowledge of the defendant's general reputation as a gambler. In the instant case, the affidavit makes specific reference to Sims' police department record and includes both the number and nature of his arrests.

Moreover, in Spinelli the Supreme Court was concerned with whether the affidavit sufficiently corroborated the tip of an unnamed and possibly unreliable informant. In the instant case, the officer did not rely on any tip but on his own knowledge and observations and the basis for both was set forth in his affidavit.

In any event, in United States v. Harris, 403 U.S. 573 (1971), the Supreme Court qualified the Spinelli language

as follows:

> "We cannot conclude that a policeman's knowledge of a suspect's reputation... is not a practical consideration of everyday life' upon which an officer (or a magistrate) may properly rely in assessing the reliability of an informant's tip. To the extent that Spinelli prohibits the use of such probative information, it has no support in our prior cases, logic, or experience and we decline to apply it to preclude a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation." 403 U.S. at 583.

Appellants also claim that the observed activities were "just as consistent with innocent conduct as criminal conduct" (Appellants' brief, p. 36) using a "divide and conquer" approach. Thus, they fragment the affidavit and attempt to show that each fragment has no criminal connotation. For example, they contend that there is nothing in the affidavit to show that the brown envelopes handed to Sims and characterized as the type used in policy operations were different "from any other brown envelope". Appellants' brief, p. 36. Similarly, appellants maintain that the "sole basis for suspicion" of the Cameron residence was Sims' arrival there each day at about the same time, followed by the arrival of "approximately six" other males, and Sims' subsequent return home with an "innocuous brown paper bag". Appellants' brief, p. 34. According to appellants, these activities do not indicate that the Cameron residence was "involved in any illegal activities". Appellants' brief, p. 35.

The defect in appellants' approach is that we are enjoined by the cases to construe an affidavit such as this "in a common-sense and realistic fashion". United States v. Ventresca, 380 U.S. 102, 109 (1965); United States v. Harris, 403 U.S. 573, 579 (1971). It is wholly unrealistic to divorce segments of Bonino's observations from the overall pattern of identical behavior which took place during the three-day surveillance. Similarly, the pattern itself must be viewed against the background of what Bonino already knew about Sims' numerous arrests for policy violations - "most of which are for Controller of Policy Operations" - and also Bonino's own expertise in the area of policy operations. When so viewed, it is evident that the magistrate properly concluded that there was a sufficient "probability" of criminal activity to justify the issuance of the warrants. Spinelli v. United States, 393 U.S. 410, 419 (1969). More is not required.

CONCLUSION

THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Dated: New York, New York
August 8, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondents-
Appellees

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

LILLIAN Z. COHEN
Assistant Attorney General
of Counsel

ADDENDUM "A"

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MEMORANDUM

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART 17

THE PEOPLE OF THE STATE OF NEW YORK

-against-

EDITH CAMERON, STANLEY SIMS, KENNETH DAVIS, ROBERT WILLIAMS, MARVIN CAMERON,

Defendants

BY O'CONNOR, J.

DATED November 30, 1971

Ind. No. 2115-71

This is a motion by the defendants to controvert the search warrant and to suppress the evidence seized thereunder.

The defendants contend that the facts alleged in the underlying affidavit of Patrolman Bonini did not provide a sufficient basis for a finding of probable cause by the Judge of the Criminal Court of the City of New York to validate the issuance of the search warrant. The police officer swore that he had knowledge and experience acquired from his work as a plainclothes police officer assigned to gambling investigation and that he was qualified by the courts as an expert on "policy" and that the investigation and observations he related in his affidavit were based on that knowledge and experience, and that from the investigation and from his expertise, his opinion was that the defendant Sims and another were taking "policy" wagers in the places specified in his affidavit and that there was probable cause to believe, based thereon, that contraband was possessed in the premises and in the vehicle described in his affidavit.

The officer's affidavit stated that the defendant Sims was "A Known Gambler, known to me to be involved in illegal policy operations" and that "Stanley Sims is known to the New York City Police Department under Known Gambler Serial No. 4993, B?24458 and has a record of 15 arrests for Policy Violations most of which are for Controller of a Policy Operation". The issuing judge properly relied on this positive, detailed and specific statement by the police officer of his knowledge of Sim's criminal history and the reference to a specific police record (the yellow sheet).

Defendants' attack on the officer's averment because he failed to define the source of, or method by which he obtained, his knowledge of Sims' criminal record is not well taken. The reference to a specific record of the Police Department, of which he was a member, to show the basis of the officer's knowledge of Sims' criminal history and reputation was not the "bald and unilluminating" assertion that a suspect was known to an officer as a gambler which was rejected as of no weight in Spinelli v. United States (393 U.S. 410, 414 [1969]).

The officer's affidavit also sets forth in detail the observations made by him of the activities of the defendant Sims for a total of approximately 17 hours during three consecutive days. On each of these days, he observed Sims being driven from his home in a car bearing Plate No. PZ 6368 N.Y. to the building at 145-40 New York Boulevard in Jamaica, Queens, and while the defendant Sims was in those premises, the officer observed persons entering the premises and then saw Sims leave the premises carrying a paper bag which he took into his home and that, thereafter, unknown persons knocked on the defendant's door and each time Sims answered the knock on the door and conversed with the person and was given a brown envelope. The officer stated that the envelopes were "of the kind which are used by policy collectors". The officer stated further that on the second and third days Sims "repeated the operation of the first day to the letter". The defendants question the meaning of this phrase and assert that it is doubtful that all of the action observed on the first day was encompassed in that phrase. It is apparent to the court that the phrase "repeated the operation *** to the letter" is as positive a statement of repetition as can be made. A policeman's affidavit "should not be judged as an entry in an essay contest". (Spinelli, supra, at 438 [Fortas, J. dissenting]; see also, United States v. Ventresca, 380 U.S. 102, 108 [1965].) The officer's conclusion, as expressed in his affidavit, that the defendant Sims and the driver of the automobile in which Sims travelled were "receiving and accepting wagers on policy inside the aforementioned premises" was, he averred, based on his expertise, investigation and observation.

When a search is based upon a magistrate's determination of probable cause, the reviewing courts will accept evidence of a less judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant and the reviewing court will sustain the judicial determination so long as "there was substantial basis for (the magistrate) to conclude that the contraband was probably present ***". (Jones v. United States, 363 U.S. 257, 271 [1962].) "In dealing with probable cause *** as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." (Brinegar v. United States, 338 U.S. 160, 175.)

This case is distinguished from Spinelli, supra, particularly in that: (1) Here there was no "bald and unilluminating assertion of suspicion", but rather a specific statement of the source of the officer's knowledge of the defendant Sims' record as a known gambler, to wit: the Police Department criminal record bearing No. B 274458; and (2) in this case there is no mere observation of Sims at a place which "could hardly be taken as bespeaking gambling activity" (at p. 414), but rather the observation on three separate days of "numerous unknown males approach premises, knock on the front door and door was answered by Stanley Sims. After a short conversation with Sims, each of these unknown males handed him brown envelopes (envelopes of the kind which are used by policy collectors,".

The issuing judge undoubtedly recognized that those engaged in wagering are a group "inherently suspect of criminal activities" (Lanza v. State, 387 U.S. 70, 79).

Whether the observations of Officer Sonini were such as could be considered "allegations that would otherwise be insufficient", within the scope of the opinion in Spinelli, supra, at pages 418-419, is best indicated by the decision of our Court of Appeals in People v. Valentine (17 N Y 2d 178, 132). In Valentine the Court said:

> "In the present case an experienced police officer, a conceded expert on the game of policy, who was familiar with its modus operandi, observed the defendant for over 70 minutes and concluded that he was engaged in activities typical of a gambling profession. The officer was warranted in satisfying himself that he had reasonable grounds for believing that a crime was being committed in his presence. (See Jackson v. United States, 307 F. 2d 194, 196 [D.C. Cir., 1962].) Here each transaction observed by the officer might have been seemingly innocent, but the repeated pattern amounted to credible cause in the eyes of an arresting officer who was well versed in the behavior of a professional policy operator. Thus under the present law the arresting officer had reasonable grounds for believing that the defendant was committing a crime in his presence ***."

In People v. Corrado (22 N Y 2d 308, 311-312) even single incidents are distinguished because, in Corrado, the court said "Unlike the present case, the only reasonable inference for what was observed by the officer in Valentine was that the man was engaged in policy." Moreover, here there were three separate lengthy observations. In People v. Brown, 24 N Y 2d 421, 423, the court indicates that a "recurring pattern of conduct sufficient to negate inferences of innocent activity" is such additional behavior which would raise "the level of inference from suspicion to probable cause."

The affidavit of Officer Bonini set forth sufficient facts to warrant a finding by the issuing judge that there was probable cause for the issuance of the search warrant.

The parties have waived the hearing granted by Mr. Justice Bosch on September 27, 1971 and have orally argued the issues on this motion.

The motion to controvert the search warrant and to suppress the evidence seized thereunder is denied.

Order entered accordingly.

The clerk of the court is directed to mail a copy of this decision and order to the attorneys for the defendants.

.....
J. S. C.

ADDENDUM "B"

THE PEOPLE OF THE STATE OF NEW YORK

- against -

EDITH CAMERON, STANLEY SIMS, KENNETH DAVIS, ROBERT WILLIAMS, MARVIN CAMERON,

Defendants.

MOTION

Indictment #2115/7
2116/7

S I R S :

PLEASE TAKE NOTICE that upon the Indictment herein, upon all the papers filed in the case herein and upon all the proceedings heretofore had, the undersigned will move this Court in Part 4 thereof to be held at the Courthouse in the City of New York, Queens County, 125-01 Queens Boulevard on the 20th day of January, 1972 at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard for an Order directing that a hearing be held to controvert the search warrant and suppr the evidence in the instant case on the basis of perjured testi- mony, and for such other and further relief as the Court may dee just and proper.

Yours, etc.

HOWARD J. DILLER, ESQ.
Attorney for the Defendants
Office & P.O. Address
299 Broadway - Suite 615
New York, New York 10007
Tel. 349-5554

TO: HON. THOMAS J. MACKELL
District Attorney - Queens County
Criminal Courts Building
125-01 Queens Boulevard
Kew Gardens, New York 11415

Clerk of the Supreme Court, Criminal Term
Queens County
Criminal Courts Building
125-01 Queens Boulevard
Kew Gardens, New York 11415

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person so served to be the person mentioned and described in said papers as the there
Sworn to before me, this day of 19

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

THE PEOPLE OF THE STATE OF NEW YORK

- against -

EDITH CAMERON, STANLEY SIMS, KENNETH DAVIS, ROBERT WILLIAMS, MARVIN CAMERON,

Defendants.

ATTORNEY'S AFFIRMATION

HOWARD J. DILLER, an attorney admitted to practice in the Courts of the State of New York affirms the following to be true under penalties of perjury:

1. I am the attorney for the above named defendants and am fully familiar with the facts surrounding their case.

2. On September 27, 1971 pursuant to a prior Motion to Controvert the Warrant a hearing was waived before Mr. Justice Bosch in this Court. No factual questions were raised and an oral argument was heard and memorandum submitted on legal issues only. For the purposes of that argument it was assumed, but not conceded, that the facts in the affidavit upon which the warrant was issued were true.

3. On November 30, 1971 Mr. Justice O'Connor, in an opinion, denied that Motion to Controvert the Search Warrant.

4. Since the submission of issues in this matter to the Court, it has come to my attention that as a result of testimony given before the Knapp Commission by Patrolman Phillips, a Federal Grand Jury has been convened to examine questions specifically related to the conduct of the arresting office in this case.

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person so served to be the person mentioned and described in said papers as the therein.
Sworn to before me, this day of 19

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5. On information and belief all the officers instrumental in effecting the arrests in this case refused to testify before that Grand Jury on the basis of the possibility of self incrimination.

6. Upon information and belief the affidavit upon which the warrant was issued contained perjured testimony.

7. This newly discovered evidence of perjury and fraudulent police conduct would make it incumbent upon this Court to grant a full hearing into this matter at this time so that a determination can be made as to whether the statements in the affidavit upon which the warrant was based were perjurious.

> Modern thought which produced the decision in Mapp v. Ohio (367 U.S. 643) would make incongruous any holding that a search warrant is beyond attack even on proof that the allegations on which it was based were perjured. Our duty is to fashion a rule which will prevent such a violation of the citizen's rights and at the same time avoid creating a situation where over-strict rules would invalidate numerous warrants simply because witnesses can later be found to swear to the opposite of what the officer swore when he procured the warrant. We hold as follows: first, that section 813-c of the Code of Criminal Procedure is to be construed so as to permit an inquiry as to whether the affidavit's statements were perjurious; second, that the burden of proof is on the person attacking the warrant (see United States v. Goodwin, 9 Cir., 1 F. 2d 36; United States v. Napela, 2 Cir., 28 F. 2d 893), and third, that any fair doubt arising from the testimony at the suppressal hearing as to whether the affidavit's allegations were perjurious should be resolved in favor of the warrant since those allegations have already been examined by a judicial officer in issuing a warrant.
>
> People v. Alfinto 16 N.Y. 2d 181, 184-5 (1965)

WHEREFORE, it is respectfully requested that a Hearing be held on the Motion to Controvert the Search Warrant and suppress the evidence and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York
January 12, 1972.

HOWARD J. DILLER

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person so served to be the person mentioned and described in said papers as the
Sworn to before me, this day of 19 therein.

ADDENDUM "C"

The People of the State of New York,

-against-

EDITH CAMERON, STANLEY SIMS, KENNETH DAVIS, ROBERT WILLIAMS, MARVIN CAMERON,

Defendants.

AFFIRMATION

State of New York)
: ss.:
County of Queens)

I, CORNELIUS J. O'BRIEN, being an attorney at law admitted to practice in the courts of this State and an Assistant District Attorney and Chief of the Appeals Bureau in the office of Thomas J. Mackell, District Attorney of Queens, attorney of record for the People of the State of New York, do hereby affirm the statements herein to be true under the penalties of perjury, except such as are made upon information and belief, which matter I believe to be true.

1. This affirmation is submitted in opposition to defendants' application for an evidentiary hearing to determine whether or not statements contained in the affidavits in support of the search warrant in this case are perjurious.

2. As Mr. Diller, attorney for the defendants, admits in his affidavit in support of the motion (para. 2), the reason why no hearing has been held heretofore is because the defendants themselves waived a hearing and elected to contest the legality of the search warrants on the law only.

3. Mr. Diller now claims that "since the submission of issues in this matter to the Court" he has discovered that "as a result of testimony given before the Knapp Commission by Patrolman Phillips, a Federal Grand Jury has been convened to examine questions specifically related to the conduct of the arresting officers in this case."

4. Mr. Diller does not state when and where said Grand Jury was convened, when he learned about this or the source of his information. Mr. Diller also does not state whether or not he learned of this so-called "newly discovered evidence" before November 30, 1969, the date of Justice O'Connor's decision denying the defendants' motion to controvert the search warrant, which would seem to your affiant to be of great importance in this case.

5. Your affiant, on this date, telephoned Assistant United States Attorney Edward M. Shaw at his office in the U.S. Courthouse, Southern District of New York. Mr. Shaw has informed your affiant that while it is true that two police officers connected with this case were called before a Grand Jury in the Southern District as a result of testimony given at the Knapp Commission hearings, the testimony sought from them had nothing whatsoever to do with their conduct in the case before this Court.

6. The Queens District Attorney's office ha received no information concerning appearances by any of the

police who participated in this case before any other Grand Jury.

WHEREFORE, it is respectfully requested that the defendants' motion be denied in all respects.

Dated: Kew Gardens, New York
January 25, 1972

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day of 19